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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 72-1737

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County and CHESTER E. WHITING, JOANNE T. GOLDSMITH, DR. RODNEY W. JOHNSON, SUE V. MILLS, DR. J. RIGHTON ROBERTSON, JESSE J. WARR, JR., PHYLLIS E. WILLIAMS, RUTH S. WOLF, members of the Board of Education of Prince George's County; and DR. CARL W. HASSELL, Superintendent of Schools of Prince George's County,

Petitioners,

v.

SYLVESTER J. VAUGHNS, JR., by his father and next friend, SYLVESTER J. VAUGHNS; TOIKA E. WHEATFALL, by her father and next friend, WALTER E. WHEATFALL; JAMES R. L. BROOKS, JR., by his father and next friend, JAMES R. L. BROOKS; REGINALD WIGGS, by his father and next friend, HOSEA WIGGS; REGINALD A. JACKSON, JR., by his father and next friend, REGINALD A. JACKSON; DENISE J. LIGON, by her father and next friend, DENNIS J. LIGON, JR.; CAROLYN GILMORE, by her father and next friend, STERLING GILMORE; JOHN A. WILLIAMS, by his father and next friend, JOHN J. WILLIAMS, individually and on behalf of all other persons similarly situated,

Respondents,

v.

JESSE ALEXANDER ELLER, MARTHA STREET ELLER, BRENDAN EDWARD LYNCH, MARJORIE ELAINE LYNCH, KENNETH PHILLIP WHITTEMORE, BETTE ANN WHITTEMORE, ARTHUR EMANUEL DINERMAN, JANET AVIN DINERMAN, MORRIS EDWARD SAMPSON, THELMA OLINDA SAMPSON, WILLIAM RAYMOND LEER, MARGARET STREET LEER, LEO PAUL CHABOT, WANDA MAXINE CHABOT, JOHN EUGENE SPAULDING and BERNADINE LANE SPAULDING,

Intervenors.

Brief of Amicus Curiae in Support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by the Board of Education of Prince George's County

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Prince George's County, Maryland files the following brief amicus curiae.

Interest of Amicus Curiae

Prince George's County, Maryland, is a body corporate and politic. It was established by the voters of Prince George's County, Maryland, through the approval of a constitutional home rule county charter adopted pursuant to Article XI-A of the Maryland Constitution. As the County government, it is obligated by the General Assembly of Maryland to levy taxes to provide, *inter alia*, for the financial support of Appellant Board of Education of Prince George's County, Maryland (Art. 77, Sec. 117, Anno. Code of Maryland). Appellant Board of Education is a semi-autonomous entity, created by the Maryland General Assembly and existing by virtue of the Public Education Code (Art. 77, Sec. 6, Anno. Code of Maryland). Said Board of Education is appointed by the Governor of Maryland, without the consultation or concurrence of the County government.

While the State of Maryland provides certain funds to the County which may be used for the operating expenses of the Board of Education, and while the State now provides for all future capital expenditures other than school site acquisition costs and certain movable equipment (Ch. 624, Laws of Maryland, 1971), approximately sixty per cent of the annual operating cost of the Appellant is derived from revenues provided by the County government. In the fiscal year which ended on June 30, 1973, the County government appropriated to the Board of Education from all sources $160,734,145 for operating expenses, including a supplemental appropriation in September, 1972, to provide a cost-of-living adjustment for School Board employees. Of this sum, approximately $14,281,176 was derived from various federal grants, including approximately $10,700,000 in so-called impacted aid money which is provided by the United

States to localities which have an inordinately large population composed of federal employees (PL 81-874, 20 U.S.C. 236-240). Additional funds are obtained by the County from the State of Maryland through general fund appropriations from the Annual Budget of the State for (1) its share of current expenses ($25,924,000) (2) current expense for incentive aid ($1,995,500) and (3) transportation ($4,751,745). (Ch. 16, Laws of Maryland, 1972). In addition, the County received from the State of Maryland $6,804,154 for schooling of the severely handicapped; some $23,600 for adult education aid; and $196,200 for driver education. The County itself provided the Board of Education from County sources some $102,194,796.[1] These County sources include principally the County real estate tax and the County's surtax on the State income tax.

The Prince George's County government has no control over those operations of the Board of Education which constitute the gravamen of the deficiencies alleged in the complaint in this case by the Appellees. The County may appropriate funds to the Board of Education only by general categories, such as administration, instructional salaries, pupil personnel services, pupil transportation, and operation of plant and equipment (Art. 77, Sec. 117, Anno. Code of Maryland). The County government has no control over pupil assignment, teacher assignment, curriculum, transportation schedules, the opening and closing of schools, or other matters which have been litigated herein. *Nevertheless, it has and will continue to be called upon to provide a substantial portion of the funds which have been and may additionally be required to implement any order which is finally forthcoming.*

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[1] The Board of Education obtained $4,562,973 from other sources of its own.

The County government is required, both by State law and its own Charter, to enact each year a balanced budget of estimated revenues and expenditures, and to impose a levy which will provide such a balance. The County government was required to undergo, during the balance of Fiscal Year 1973, extra unanticipated expenditures of $213,862, as a result of Judge Kaufman's orders. In addition the County will continue to be called upon to provide funds to pay for the costs of implementing Judge Kaufman's orders.

REASONS FOR GRANTING THE WRIT

Introduction

By Order of Judge Frank Kaufman, dated July 25, 1972, the District Court for Maryland granted the plaintiff's motion for summary judgment, and held, based solely upon the Joint Stipulation of Facts filed by the Prince George's County Board of Education (Petitioners) and Sylvester Vaughns, et al. (Respondents) that the school system was in violation of the constitutional standards of *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Swann v. Charlotte – Mecklenberg Board of Education*, 402 U.S. 1 (1971).

This decision of the lower court merits review not only because of the general national importance of any civil rights litigation, but because the holding of the court below may significantly affect the future requirements and application of the Summary Judgment rule whenever it is utilized in the federal court system.

I.

THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS ERRED IN HOLDING THAT A UNITED STATES DISTRICT COURT CAN PROPERLY ISSUE A PARTIAL SUMMARY JUDGMENT BASED SOLELY UPON A JOINT STIPULATION OF FACTS FILED FOR THE PURPOSE OF EXPEDITING AN EVIDENTIARY HEARING, WHEN SUCH MOTION FOR SUMMARY JUDGMENT WAS OPPOSED BY BOTH ANSWER OF DEFENDANT AND ACCOMPANYING AFFIDAVITS IN SUPPORT OF SUCH OPPOSITION.

The Record of the proceedings in the District Court below, indicates that the Respondents filed an Opposition to Plaintiffs' Motion for Summary Judgment on June 2, 1972, and that the Petitioners filed their Answer to Plaintiff's Motion for Summary Judgment twelve days later, opposing the plaintiff's motion and attaching two Affidavits in support of that opposition.

On July 6, 1972 both parties filed a Joint Stipulation of Facts accompanied by eighteen Exhibits. Later that same day, the Petitioner Board of Education filed a Supplemental Memorandum of Facts and Law in support of their original Answer and Opposition to Plaintiff's Motion for Summary Judgment.

The District Court Opinion and Order of July 25, 1972 was based solely upon material contained within the Joint Stipulation of Facts.

Summary Judgment is a procedure designed to expedite litigation, in certain instances, through the judicial system. It is

> "(N)ot a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth." *Whitaker v. Coleman*, (5th Cir. 1940), 115 F.2d 305.

It is Petitioner's contention, which Prince George's County supports, that the granting of the Summary Judgment in the court below was not a proper procedure to further the District Court's goal of arriving at the truth, and should have been denied.

The granting of a summary judgment motion in any constitutional law case is of itself an unusual step. See *Boulware v. Battaglia*, (D. Del. 1972), 344 F. Supp. 889; *Sinderman v. Perry*, (5th Cir. 1970), 430 F.2d 939. As one federal court has aptly held in a housing discrimination case,

> "It is especially in civil rights disputes that we ought to be chary of disposing of the case on pretrial motions and courts do in fact have a prediliction for allowing civil rights cases to proceed until a comprehensive record is available to either support or negate the facts alleged." *Sisters of Providence of St. Mary's of the Woods v. City of Evanston* (N.D. Ill. 1971), 335 F. Supp. 396.

In concurrence is *Hayes v. Cape Henlopen School District* (D. Del. 1972), 341 F. Supp. 823, where the court wrote that in cases raising federally protected constitutional claims, "(A) court could not grant Summary Judgment if there is the slighest doubt that there remains a disputed relevant fact." *Hayes*, at 837.

Not only is the federal court system especially reluctant to utilize the summary judgment procedure in constitutional law cases, but the motion,

> "(S)hould not be granted unless the entire record shows a right to judgment so as to leave no room for controversy and establish affirmatively that the adverse party cannot prevail under any circumstances." *Batchelder v. Legg and Co.* (D. Md. 1972), 55 F.R.D. 557.

This "no room for controversy" not only means that the facts must be non-controversial, but that the inferences that can be drawn from these facts must be similarly uncontroverted. Of special relevance to this particular point and the case at hand, is *American Fidelity and Casualty Co. v. London and Edinburgh Insurance Co.* (4th Cir. 1965), 354 F.2d 214. Judge Bell's opinion stated that,

> "It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may be properly drawn. Under such circumstances the case is not to be one decided on a motion for summary judgment."

In accord is: *Girard v. Gill* (4th Cir. 1958), 261 F.2d 695; *S.J. Groves and Sons Co. v. Ohio Turnpike Commission* (6th Cir. 1963) 315 F.2d 735; *Cole v. Chevron Chemical Co., Oronite Div.* (5th Cir. 1970) 427 F.2d 390; and *Batchelor, supra.* See, also, *Crystal City v. Del Monte Corp.* (5th Cir. 1972), 463 F.2d 976, where the Court of Appeals reversed the granting of a summary judgment based on a stipulation of facts.

The Supreme Court also agrees with the lower federal courts on the consideration of the inference that can be applied to given facts when weighing a summary judgment motion. In *U.S. v. Diebold, Inc.*, 369 U.S. 654 (1962), the

Per Curiam decision of the Court not only mentioned the "inference to be drawn from the underlying facts contained in such (supporting) materials," but held that this inference "must be viewed in the light most favorable to the party opposing the motion." *Diebold*, at 655.

Disagreement as to the inference to be applied to facts within the Joint Stipulation are readily apparent in this litigation. Although existing policy and practice in regard to faculty, staff, transportation, extracurricular activities, and facilities are among the most important indicia of a segregated school system, *Swann*, supra, and *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), Petitioner here was prevented by the granting of summary judgment to demonstrate constitutional compliance in these areas. The lower court order of July 25, 1972 was based only upon black-white pupil ratios.

In addition, *Swann, supra*, provided that,

> "... it should be clear that the existence of some small number of one-race, or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law." *Swann*, at 26.

It is easily recognizable that the phrase "virtually one-race" is susceptible to several meansings. Does it provide that six totally "black" schools out of 232 schools in the system (2.6%) mean a constitutionally impermissible segregated school system, or that, as in *Bivens v. Bibb County Board of Education* (M.D. Ga. 1971), 331 F. Supp. 9, reversed on other grounds, (5th Cir. 1972), 460 F.2d 430, fourteen percent of the system (seven of fifty-eight schools) may remain "one race?"

Indeed, the phrase "one-race" itself is susceptible to several inferences. Does it mean a ratio of fifty-one percent black to forty-nine percent white, or seventy-eight to twenty-two percent, or ninety-nine to one percent? Would eight of two hundred-thirty-two ninety-nine per cent "black" schools be permissible or would eight schools fifty-one per cent "black" denote segregation? Clearly, the "black-white" ratio in the Board of Education's schools, in conjunction with the "one-race" and "virtually one-race" concept of *Swann* provides controverted inferences based on the mere statistical numbers, and as a result summary judgment should have been denied.

Another factor presented in Petitioner's argument is the *dejure* verses *de facto* distinction. Although Justice Brennan wrote in *Keyes v. School District No. 1*, Docket No. 71-507, June 21, 1973, that "the differentiating between *de jure* segregation and so-called *de facto* segregation to which we referred to in *Swann* is *purpose* or *intent* to segregate," (emphasis by the Court), Petitioner, due to the granting of the motion for summary judgment, was unable to demonstrate to the District Court its lack of purpose or intent to maintain a racially segregated school system. Although Justice Brennan said that the school authorities' burden is to "adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions," the granting of the summary judgment motion precluded the Petitioner from presenting such proof. Evidence presented in the Stipulation and discussed by Judge Kaufman concerning the flight of blacks from the District of Columbia into western Prince George's County, a factor which has different inferences when taken into consideration with the physical location of "one-race" schools certainly would

support an inference that the school system is *de facto*, and not *de jure*, segregated.

The Maryland Court of Appeals decision in *Borders v. Board of Education*, 265 Md. 488, 290 A.2d 510 (1972) held, in approving a plan of Petitioner's to desegregate the last two remaining secondary schools in the system, that, "in the present case *de facto* segregation prevailed." Yet the inferences as to the cause of racial imbalance in the school system was ignored in the court below. The summary judgment has similarly prevented the proof that the Petitioner's system is a racially neutral one. See *Bivens, supra*, and *Boyd v. Pointe Coupee Parish School Board* (E.D. La. 1971), 332 F. Supp. 994.

Not only must there be a showing that no controversy as to the inference of the facts exists, such showing failing here, but the burden of proving no controversial inference rests squarely on the moving party (the Respondent, here). Indeed, according to one District Court, the summary judgment should only be granted when the party opposing the motion for summary judgment, "fails either to offer counter affidavits or materials that raise a credible issue . . . " *Soucie v. Hackenberg*, (M.D. Pa. 1971), 344 F. Supp. 1247. See, also, *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, (1970). In the instant case, of course, the summary judgment motion *was* properly opposed by Petitioner.

Furthermore, summary judgment can not be granted where critical elements of the case are missing. In *Adickes, supra*, the white plaintiff was granted a summary judgment in her case alleging a conspiracy to deprive her of her civil rights, based upon her arrest for vagrancy after trying to eat with a

group of blacks at a lunch counter. Because she failed to establish a connection between the police action and the lunch room personnel, the summary judgment was reversed. The Court reasoned that "respondent failed to fulfill her initial burden of demonstrating what is a critical element . . ." Similarly, the Supreme Court over-turned a lower court grant of summary judgment in an equal protection claim in a state sponsored school financing case:

> "Since the manner in which the program operates may be critical in the decision of the equal protection claim, that claim should not be decided without fully developing the factual record at a hearing." *Askew v. Hargrove*, 401 U.S. 476 (1971).

The "critical element" of *intent* to segregate is lacking in Respondent's case due to the granting of the Motion for Summary Judgment. The "manner" that any alleged segregation arose is similarly precluded by the summary judgment.

CONCLUSION

For the reasons set out in this Petition, this Court should grant the Writ of Certiorari and set the case down for briefing and argument on the merits.

Respectfully submitted,

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*The County Attorney wishes to acknowledge the substantial contribution of Mark F. Leopold, a second year law student at Loyola University of Chicago, for his work on this brief.